Supreme Court, U.S.
FILED
OCT 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-380 (2)

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

MICHIGAN BEER AND WINE WHOLESALERS ASSOCIATION, A MICHIGAN NONPROFIT CORPORATION,

Petitioners,

v

ATTORNEY GENERAL OF MICHIGAN AND MICHIGAN LIQUOR CONTROL COMMISSION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF OF RESPONDENT ATTORNEY GENERAL IN OPPOSITION

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13 pp

QUESTIONS PRESENTED FOR REVIEW

Petitioner's statement of the question is unduly restrictive, focusing only upon the free speech rights of liquor licensees while ignoring the corresponding right of the consuming public to hear the speech in question. Accordingly, Respondent would restate the question as follows:

> DO ADMINISTRATIVE RULES OF THE MICHIGAN LIQUOR CONTROL COMMISSION, WHICH PERMIT EXTENSIVE BRAND ADVERTISING OF BEER AND WINE BUT PROHIBIT TRUTHFUL PRICE ADVERTISING OF SUCH PRODUCTS OFF THE LICENSED PREMISES, VIOLATE THE FREEDOM OF COMMERCIAL SPEECH AS GUARANTEED BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

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BRIEF OF RESPONDENT IN OPPOSITION

Respondent, Michigan Attorney General Frank J. Kelley, prays that this Court will deny the writ of certiorari sought by Petitioners, the Michigan Beer and Wine Wholesalers Association.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is reported at 142 Mich App 294; 370 NW2d 328, and appears as

Appendix C to the petition filed by Petitioners. On February 5, 1986, the Michigan Supreme Court denied Petitioner's application for leave to appeal. That order has been printed as Appendix A to the petition for writ of certiorari. Finally, the Michigan Supreme Court on April 28, 1986, entered an order denying Petitioners motion for reconsideration of the Court's February 5, 1986 order denying leave to appeal. That order is printed as Appendix B to the petition for a writ of certiorari in this case.

JURISDICTION

Respondent agrees with Petitioner's assertion that jurisdiction in this matter is controlled by 28 USC 1257. As is discussed more fully in our argument, however, Respondent contends that this Court should decline to exercise jurisdiction for the reason that the decision of the Michigan Court of Appeals clearly and plainly articulates an adequate and independent state ground for its decision.

CONSTITUTIONAL PROVISIONS AND APPLICABLE REGULATIONS

Respondent agrees with the statement of constitutional provisions and applicable regulations as set forth at pages 2 through 4 of the petition for certiorari filed by petitioners.

STATEMENT OF CASE

Respondents do not contest the accuracy of the statement of the case as set forth at pages 4 and 5 of the Petition for Writ of Certiorari filed by Petitioners. That statement, however, omits certain crucial information. Accordingly, Respondents instead adopt the more complete statement of the case as set forth in the opinion of the Michigan Court of Appeals at pages 4 through 7 of Petitioner's Appendix C.

One particular omission from Petitioner's statement of the case is especially crucial. From a reading of that statement, one would be led to the conclusion that the decision of the Michigan Court of Appeals was predicated solely upon the issue of freedom of commercial speech under the First and Fourteenth Amendments to the United States Constitution and under Article 1, section 5 of the Michigan Constitution of 1963. Such was not, however, the case. In addition to finding that the administrative rules here in question violated the freedom of commercial speech, the Michigan Court of Appeals specifically and separately held that those rules did not meet the necessary standard for the exercise of the State's police power under the Michigan Constitution. Specifically, the Court of Appeals stated:

> "The constitutional right to engage in business is subject to the police power of the state to preserve the public, health, safety, morals, and general welfare. *See, Carolene Products Co.* v *Thomson*, 276 Mich 172, 178; 267 NW 608 (1936). If a 'real and substantial relationship' exists between regulations enacted pursuant to a state's police power and the health, safety, morals or general welfare of the public, the regulations will be upheld unless they 'needlessly *** invade property or personal rights as protected by the Constitutional ***'. *Grocers Dairy Co* v *Dep't of Agriculture Director*, 377 Mich 71, 76; 138 NW 2d 767 (1966); *Carolene Products, supra*, p 178. A presumption of validity attaches to legislative or administrative remedies. *Carolene, supra.*
>
> "Despite the presumption of validity accorded to the commission's regulations, we hold that a 'real and substantial' relationship does not exist between them and the promotion of temperance for the reasons outlined above under Section II-D. . . ." Opinion of the Michigan Court of Appeals, Petitioner's Appendix C, p 20.

REASONS FOR DENYING THE WRIT

Petitioners have asserted that this Court should grant a writ of certiorari in this case, arguing in essence that the Michigan Court of Appeals erroneously distinguished this Court's summary affirmance in *Queensgate Investment Co.* v *Liquor Control Commission,* 459 US 807; 103 S Ct 31; 74 LEd 2d 45 (1982), dismissing appeal from 69 Ohio 2d 361; 433 NE2d 138 (1982), and because, at least in Petitioner's view, the decision of the Michigan court cannot be reconciled with this Court's recent decision in *Posadas de Puerto Rico Associates* v *Tourism Co. of Puerto Rico,* 478 US _____; 106 S Ct 2968; 92 LEd 2d 266 (1986). These assertions by Petitioners, we contend, simply are not correct. More importantly, regardless of whether the decision of the Michigan Court of Appeals correctly construed and applied the First and Fourteenth amendments to the United States Constitution, that decision rested as well on an adequate and independent state ground under the Michigan Constitution.

I.

THE DECISION OF THE MICHIGAN COURT OF APPEALS RESTS ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

At footnote 9 of their brief, Petitioners make the following statement:

> "The opinion of the court of appeals cited only federal cases on the Free Speech issue and mentioned the Michigan Constitution only once, and then with a footnoted disclaimer that the court was ruling that the Michigan Constitution provided any more protection than the Federal Constitution. The judgment below

> does not rest on State grounds, *New York* v *Class* ____US ____(No 84-1181, *decided* February 25, 1986, 89 LEd 2d 81)."

What this statement omits is that the decision of the Michigan Court of Appeals was not predicated solely on the free speech issue. Rather, the Michigan Court of Appeals also expressly predicated its decision on a separate and independent state ground which is entirely adequate to support the decision reached by that Court regardless of how this Court may dispose of the free speech issue under the Federal Constitution. In addition to concluding that the administrative rules in question were invalid as an improper constraint upon the freedom of commercial speech, the Michigan Court of Appeals expressly held that those regulations failed to satisfy the requirements for the exercise of the police power under the Michigan Constitution. *See*, Opinion of the Michigan Court of Appeals, Part III, Petitioners Appendix C, p 20. As this Court recently observed in *Michigan* v *Long*, 463 US 1032, 1041; 103 Supreme Court 3469; 77 LEd 2d 1201 (1983):

> "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate and independent grounds, we, of course will not undertake to review the decision."

Accordingly, this Court should decline to undertake review of the decision of the Michigan Court of Appeals in this case.

II.

THE DECISION OF THE MICHIGAN COURT OF APPEALS IS NOT INCONSISTENT NOR IRRECONCILABLE WITH THE PRIOR DECISIONS OF THIS COURT

Petitioners assert that the opinion of the Michigan Court of Appeals incorrectly distinguished this Court's decision summarily affirming the decision of the Ohio Supreme Court in *Queensgate Investment Co.* v *Liquor Control Commission, supra,* and, in addition, is inconsistent with the recent decision of this Court in *Posadas de Puerto Rico Associates* v *Tourism Co of Puerto Rico, supra.* We contend that both of these assertions are simply incorrect.

The Michigan Court of Appeals' analysis of the *Queensgate* decision is found in Part II-B of the Court's opinion. (Petitioner's Appendix C, pp 11-14). As the Court there noted, the administrative rules involved in *Queensgate* were substantially less restrictive than the Michigan Liquor Control Commission here in question. We submit that this analysis by the Michigan Court of Appeals is entirely sound.

This Court's recent decision in *Posadas de Puerto Rico, supra,* was issued subsequent not only to the opinion of the Michigan Court of Appeals in this case, but also subsequent to the order of the Michigan Supreme Court denying leave to appeal. Nevertheless, it simply is not true that the decision of the Michigan Court is inconsistent with that recent case. This Court, in *Posadas,* upheld the validity of a Puerto Rican statute and administrative regulations which placed certain restrictions on advertising by legal gambling casinos. We believe that those restrictions, like those in *Queensgate,* are distinguishable on their face from those involved in this case. There is, moreover, an even

more fundamental basis for distinguishing the decision in the instant case from that reached by this Court in *Posadas*. This Court has established a four part analysis for determining the validity of restraints on commercial speech. *See, Central Hudson Gas and Electric Corp* v *Public Service Commission of New York*, 447 US 557, 566; 100 Supreme Court 2343; 65 LEd 2d 341 (1980). The third step of that analysis requires an examination as to whether the challenged restrictions on commercial speech "directly advance" the government's asserted interest. That step of the *Central Hudson Analysis* was clearly satisfied by the regulations under consideration in *Posadas*. This Court stated in that case:

> "Step 3 [of the Central Hudson test] asks the question whether the challenged restrictions on commercial speech 'directly advance' the government's asserted interest. In the instant case, the answer to this question is clearly 'yes.' The Puerto Rico Legislature obviously believed, when it enacted the advertising restrictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable one, . . . " *Posadas, supra,* 478 US, at _____; 92 LEd 2d, at 281.

Thus, in *Posadas,* this Court was reviewing a regulatory scheme adopted by the legislature and subsequently approved (and modified) by the Supreme Court of Puerto Rico. Here, in contrast, we are dealing with administrative rules promulgated by a state agency. Moreover, rather than approving those rules, the state courts have invalidated them, finding that the rules in question do not directly advance the government's asserted interest. The Michigan Court of Appeals concluded, among other things, that while a *total* ban on *all* alcohol advertising might indeed

have some effect in reducing consumption of alcoholic beverages, the Michigan regulatory scheme, which permitted extensive and pervasive advertising of beer and wine brands, prohibiting the advertising only of the price of those beverages, could not be said to directly advance the government's interest. Opinion of the Michigan Court of Appeals, part II-D (Petitioners Appendix C, pp 17-20). This decision was left undisturbed by the Michigan Supreme Court. Accordingly, we contend, the decision of the Michigan Court of Appeals is entirely consistent with the decision reached by this Court in the *Posadas* case.

CONCLUSION AND RELIEF SOUGHT

Wherefore, Respondent respectfully prays that this Court will deny certiorari.

Respectfully submitted,

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